A

Re Sanda Industries Bhd & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D2-24-533 OF 1998
ABDUL AZIZ J
23 NOVEMBER 1998

B

Companies and Corporations *— Arrangement, scheme of —Restraint of proceedings — No nomination or appointment of director under s 176(10A) (d) — Whether court may grant restraining order — Companies Act 1965 s 176(10A) (d)*

C The issue was whether — in an application for orders under sub-s (1) of s 176 of the Companies Act 1965 and for a restraining order under sub-s (10) — and where no person has been nominated as a director for the purposes of para (d) of sub-s (10A) of s 176, the court may still grant a restraining order.

D **Held**, refusing to grant the restraining order:

Paragraph (d) gives the court the power or discretion to approve or appoint the person nominated as a director. If the court does not approve or appoint such person, the court is not to grant a restraining order. In other words, even where a person is nominated, no restraining order may be granted if the court does not approve or E appoint him to act as a director (see p 696F–G).

[Bahasa Malaysia summary

Isu adalah sama ada — dalam satu permohonan untuk perintah-F perintah di bawah s 176(1) Akta Syarikat 1965 dan untuk satu perintah penahanan di bawah sub-s (10) — dan di mana tiada sesiapa telah dicalonkan sebagai seorang pengarah untuk tujuan-tujuan perenggan (d) s 176(10A), mahkamah masih boleh memberikan perintah penahanan.

G **Diputuskan**, menolak permohonan untuk perintah penahanan:

Perenggan (d) memberi kuasa atau budi bicara kepada mahkamah untuk meluluskan atau melantik orang yang dicalonkan sebagai seorang pengarah. Sekiranya mahkamah tidak meluluskan atau melantik orang sedemikian, mahkamah tidak boleh memberikan H perintah penahanan. Dengan kata lain, biarpun di mana seseorang dicalonkan, tiada perinah penahanan boleh diberikan sekiranya mahkamah tidak meluluskan atau melantiknya untuk bertindak sebagai seorang pengarah (lihat ms 696F–G).]

I **Notes**

For a case on restraint of proceedings in a scheme of arrangement, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) para 17.

Legislation referred to

Companies Act 1965 s 176, (1), (10), (10A)(d)

Azhar Azizan Harun (*Azhar & Goh*) for the applicants.

Abdul Aziz J: This is an ex parte application filed on 19 November 1998 for orders mainly under sub-s (1) of s 176 of the Companies Act 1965 and for a restraining order under sub-s (10).

On 1 November 1998, sub-s (10A) came into force. By that subsection, Parliament allows the court to grant a restraining order under sub-s (10) 'if and only if' the requirements of paras (a), (b), (c) and (d) are met. The requirement of para(d) is that:

> [The court] approves the person nominated by a majority of the creditors in the application by the company under sub-s (10) to act as a director or if that person is not already a director, notwithstanding the provisions of this Act or the memorandum and articles of the company, appoints the person to act as a director.

No person has been nominated for the purposes of para (d). Some indication of the reason for the failure has been given orally by learned counsel for the applicants. He submitted that the proper construction of para (d) is that if no person has been nominated in pursuance of para (d), the court is not required by that paragraph to approve or appoint any person to act as a director of the company and therefore the requirement of para (d) will not apply.

My opinion as to the true construction of para (d) is as follows.

Paragraph (d) gives the court the power or discretion to approve or appoint the person nominated as a director. The court is not bound to approve or appoint him. For good reasons, it may refuse to approve or appoint him. If the court does not approve or appoint him, the court is not to grant a restraining order. In other words, even where a person is nominated, no restraining order may be granted if the court does not approve or appoint him to act as a director. That serves to convince me that the intention of Parliament as regards para (d) is that there must be a person approved or appointed under that paragraph if there is to be a restraining order under sub-s (10). So if, for whatever reason, no person is nominated by the creditors, there can be no one to approve or appoint; no one then is approved or appointed, and no restraining order may be granted.

I am, therefore, not at liberty to grant the restraining order.

Restraining order refused.

Reported by Loo Lai Mee

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